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Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

TYSON E. TATUM,

Petitioner,

v.

VANLINER INSURANCE COMPANY
OF FENTON, MISSOURI,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Did the United States District Court and the United States Court of Appeals err in granting the Respondent a set-off to the uninsured motorist policy limits from a prior settlement with a different insured joint tortfeasor?

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CITATION OF OPINION

Tyson E. Tatum, Appellant v. Vanliner Insurance Company of Fenton, Missouri, 104 F.3d 223 (8th Cir. 1997)

BASIS FOR JURISDICTION

1. Judgment was entered January 13, 1997.

2. Petitioner's Motion for Rehearing and Rehearing en banc was denied on February 26, 1997.

3. The statutory provision which confers on this Court jurisdiction to review this matter on a Writ of Certiorari is 28 U.S.C. §1254.

STATUTE INVOLVED

R.S.Mo. §379.203(1) – No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto, or in the case of any commercial motor vehicle, as defined in section 301.010, R.S.Mo., any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, R.S.Mo., for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of

uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed subject to the limits prescribed in this section, to satisfy the requirements of this section.

STATEMENT OF THE CASE

This is a Petition for Writ of Certiorari for a review of an opinion rendered by the United States Court of Appeals Eighth Circuit. The jurisdiction of the United States District Court was based upon diversity jurisdiction. The Petitioner is a resident of Illinois. The Respondent is a resident of Missouri. There is diversity jurisdiction pursuant to 28 U.S.C. §1332.

This is a claim for personal injuries sustained by the Petitioner, Tyson Tatum, as a result of a collision between two tractor trailers. The collision occurred on October 31, 1990.

At the time of the collision the Petitioner was a passenger in a tractor trailer operated by an individual

named William Tribble. As the Petitioner and Mr. Tribble were traveling Eastbound on Interstate 76, a phantom vehicle, identified only as a red Escort, cut in front of their tractor trailer. As a result of the actions of the Escort, the Tribble tractor trailer was required to slam on his brakes. His tractor trailer was then rear ended by another tractor trailer operated by an individual named Mark Taylor. Mark Taylor was employed by National Carriers. As a result of this collision the Petitioner sustained serious and permanent injuries.

Suit was filed in the State of Kansas against Mark Taylor and National Carriers. As a result of that suit, a settlement was obtained on behalf of the Petitioner in the amount of $150,000.00.

At the time of the collision Tyson Tatum was employed by Hogan Transport. Hogan Transport purchased a policy of automobile insurance from the Respondent, Vanliner Insurance Company of Fenton, Missouri. This insurance policy provided uninsured motorist protection to the Petitioner with policy limits of $50,000.00.

The case at bar involves an uninsured motorist claim against Vanliner Insurance Company of Fenton, Missouri. This cause of action is based upon the negligent acts of the phantom vehicle, identified only as a red Escort.

The Respondent's uninsured motorist policy has the following provision:

> "any amount payable under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's liability coverage".

On January 4, 1996, at the suggestion of the Honorable Charles Shaw, the Respondent filed a Motion to Dismiss. This Motion asserted the above-mentioned policy provision and requested a set-off to its uninsured motorist policy limits and liability from the amount of the prior settlement with Mark Taylor/National Carriers. On January 5, 1996, the Honorable Charles Shaw orally sustained this Motion thereby granting the Respondent the requested set-off. No formal opinion was ever issued.

The Petitioner thereafter filed a timely Appeal to the United States Court of Appeals for the Eighth Circuit. On January 13, 1997, the United States Court of Appeals for the Eighth Circuit rendered its Opinion affirming the decision of the United States District Court.

On January 27, 1997, Petitioner filed his Motion for Rehearing en banc. On February 26, 1997, the United States Court of Appeals denied Petitioner's Motion for Rehearing or Rehearing en banc.

ARGUMENT

The Petitioner requests this Court to exercise its judicial discretion and grant this Petition for Writ of Certiorari. It is respectfully submitted that the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory powers.

The District Court's ruling and the Appellate Court's affirmation have violated: 1) A Missouri statute and 2) firmly entrenched Missouri public policy.

The rulings of the United States District Court and the United States Court of Appeals have, for the first time in Missouri law, permitted an uninsured motorist carrier to obtain a set-off from its statutorily mandated uninsured motorist protection from a settlement with a different insured joint tortfeasor. These holdings will eliminate the uninsured motorist protection which is mandated by statute in Missouri. The holdings also violate public policy, and inhibit a Plaintiff from settling with one joint tortfeasor when the remaining joint tortfeasor is an uninsured motorist.

This is a claim for personal injuries when a tractor trailer in which the Petitioner was a passenger was required to slam on its brakes as a result of being cut off by a vehicle identified only as a red Escort. The red Escort then left the scene of the collision and could not be further identified. The Petitioner's tractor trailer was then rear ended by a National Carriers tractor trailer operated by Mark Taylor.

A lawsuit was filed against National Carriers and Mark Taylor and settled for $150,000.00. Thereafter this cause of action was filed against Vanliner Insurance Company of Fenton, Missouri, which provided uninsured motorist protection on the tractor trailer in which the Petitioner was a passenger. The uninsured motorist policy limits were $50,000.00. This cause of action is based upon the negligence of the phantom vehicle identified only as a red Escort.

Uninsured motorist protection in Missouri is governed by R.S.Mo. §379.203. This statute makes uninsured motorist protection in Missouri mandatory. §379.203(1) Provides

> "no automobile liability insurance . . . shall be delivered or issued . . . unless coverage is provided . . . for the protection of the persons insured thereunder who are legally entitled to recover damages from the owners or operators of uninsured motor vehicles . . . "

As can be seen by the above-quoted language, uninsured motorist protection in the State of Missouri is statutorily mandated. When an insurance policy is issued in the State of Missouri it must contain uninsured motorist protection. As such, any policy language which attempts to reduce the sums payable under the uninsured motorist provisions are void as against public policy, *Cano v. Travelers Insurance Company,* 656 S.W.2d 266 (Mo.Banc. 1983); *Douthet v. State Farm Mutual Automobile Insurance Company,* 546 S.W.2d 156 (Mo.Banc. 1977).

Vanliner's uninsured motorist policy provides "any amount payable under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible . . . " This policy language attempts to reduce or eliminate the uninsured motorist protection which is mandated by R.S.Mo. §379.203. If enforced, this provision would completely defeat the specific wording and purpose of the uninsured motorist statute.

Since uninsured motorist protection is mandated and required by statute, any policy language which attempts to restrict or limit the uninsured motorist coverage is void and unenforceable as against public policy. §379.203

" . . . requires that coverage in the amounts required by the safety responsibility law not be diminished by contractual limitation absent express statutory authority . . . it would violate the public policy expressed in §379.203 to permit diminution of coverage . . . ", *Douthet v. State Farm Mutual Automobile Insurance Company,* 546 S.W.2d 156 (Mo.Banc. 1977) at page 159.

There is no language in §379.203 which authorizes a reduction in the uninsured policy limits based upon a settlement with a different insured joint tortfeasor.

The uninsured motorist coverage provides protection for the negligence of the uninsured motorist (the red Escort). The Vanliner uninsured motorist policy provision authorizes a reduction in a statutorily mandated uninsured motorist protection based upon a settlement with a different insured joint tortfeasor (the National Carriers tractor trailer). There is no statutory authority for such a reduction. The holdings of the United States District Court and United States Court of Appeals have permitted an unauthorized diminution of the statutorily mandated uninsured motorist protection.

In the case at bar there are two negligent tortfeasors (one insured and one not insured). There is the National Carriers' tractor trailer (insured) and the red Escort which left the scene of the collision (not insured). The holdings of the District Court and Court of Appeals permit a settlement with the National Carrier tractor trailer to be deducted from the uninsured motorist policy limits (which provided protection to the Petitioner for the negligence of the red Escort). The Appellant is entitled to a

recovery from both joint tortfeasors. To enforce the uninsured motorist policy provision violates the public policy of Missouri

> " . . . the public policy of Missouri now declares that the minimum benefits . . . without diminishment, be available to an insured injured by an uninsured motorist. It also means that the insurance policy provision which designs to restrict the insured from these benefits evades the purpose of the statute and is void as against public policy,"

Craig v. Iowa Kemper Mutual Insurance Company, 565 S.W.2d 716 (Mo.App. 1978).

The uninsured motorist benefits, without diminishment, shall be available to an insured injured by an uninsured motorist. The provision at bar, diminishes and eliminates the benefits available to the Petitioner because of injuries resulting from the negligence of the uninsured motorist. Reducing the amount of the statutorily mandated uninsured motorist protection, by the amount of the settlement with the other joint tortfeasor, defeats this specifically stated purpose of §379.203.

The United States Court of Appeals for the Eighth Circuit rendered its decision in *Bernardo v. Northland Insurance Company*, 45 F.3d 272 (8th Cir. 1995). The *Bernardo* Court cited with approval the principles stated in *Otto v. Farmers Insurance Company*, 558 S.W.2d 713 (Mo.App. 1977). While discussing R.S.Mo. §379.203, the *Bernardo* Court cited *Otto* and stated

> "the purpose of the statute is 'to give persons insured by such coverage, when injured by an uninsured motorist, protection parallel to that

> which they would have had if they had been injured in an accident caused by a motor vehicle covered by the minimum liability requirements of the financial responsibility law' ", *Bernardo* page 274.

The United States Court of Appeals' decision conflicts with *Bernardo* and defeats this public policy. To grant the off-set to the uninsured motorist coverage from the coverage of the insured joint tortfeasor would not put the Petitioner in a position where his protection is parallel to that which he would have had if he had been injured by a vehicle which was insured. The cause of action against National Carriers was settled for less than full value because of the negligence of the red Escort. The uninsured motorist policy provision prevents the Petitioner from being in a position where his protection is parallel to that which he would have been if he had been injured by a vehicle which was insured.

If this policy provision is enforced, it will inhibit the ability of all Plaintiffs to settle any claim involving joint tortfeasors (where one of the torteasors is an uninsured motorist). A settlement with the insured tortfeasor will result in a reduction of the policy limits of the uninsured motorist carrier if this policy provision is enforced. The reduction in the uninsured motorist protection will be a circumvention of the Missouri uninsured motorist statute.

Taken a step further, this policy provision will virtually eliminate uninsured motorist protection in the State of Missouri (in cases where there are joint tortfeasors). Let's theorize what would have happened if this claim against National Carriers and the Respondent had been filed in the District Court at the same time. Let's

further theorize that the jury proportioned damages in the following amounts: $150,000.00 against National Carriers and $50,000.00 against Vanliner. The Respondent would then assert that because of the recovery from National Carriers (and the policy provision), there is an off-set and no recovery to the Petitioner from the Respondent's uninsured motorist policy. This result clearly circumvents the purpose of the Missouri legislature passing the uninsured motorist statute.

If this policy provision is enforced all insurance companies will place this provision in their uninsured motorist policies. The result will be the elimination of uninsured motorist protection in situations involving joint tortfeasors. This inevitable result is precisely why the Court of Appeals' ruling has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory power. The holding of the Court of Appeals sanctioned this same departure by the District Court and once again calls for the exercise this Court's supervisory power.

The United States Court of Appeals for the Eighth Circuit based its ruling primarily on the case of *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo.Banc. 1996). It is respectfully submitted that *Ragsdale* does not provide a basis for the Appellate Court's Opinion at bar. *Ragsdale* dealt with uninsured motorist protection for the negligence of an individual who was actually insured. In *Ragsdale*, the Defendant (Armstrong) had a policy of insurance but for less than the minimum required by Missouri statutes. This fact caused the Missouri Supreme Court to become divided as to whether Armstrong was, in fact, an uninsured motorist. The fact that Armstrong

had insurance (but for less than the required amount) is precisely why the Missouri Supreme Court off-set Armstrong's insurance coverage from the uninsured motorist coverage. Once the tortfeasor's insurance company paid its policy limits the Missouri Supreme Court granted additional protection to the Plaintiff for the difference between the tortfeasor's policy limit and the uninsured motorist policy limit.

In *Ragsdale* there was but one tortfeasor. The fact that there are joint tortfeasors in the case at bar make *Ragsdale* inapplicable. The uninsured motorist coverage provides protection for the negligence of the red Escort, not for the negligence of the tractor trailer. There is no authority for taking a settlement with one tortfeasor and reducing the policy limits for a second joint tortfeasor.

Insurance companies have attempted to restrict the mandated uninsured motorist protection through policy provisions on multiple occasions. In each instance the Missouri Court of Appeals and Supreme Court have denied their ability to restrict or limit uninsured motorist coverage. Insurance companies have attempted to have a set-off of uninsured motorist protection from Workers' Compensation benefits. These provisions were held to be invalid, *Douthet* page 159, *Cano v. Travelers Insurance Company*, 656 S.W.2d 266 (Mo.Banc. 1983).

Insurance companies have attempted to circumvent the uninsured motorist statute by inserting policy provisions which provide for a set-off of uninsured motorist protection by medical pay payments which are made under the same policy. This policy provision was once again held invalid and void as against public policy, *Webb*

v. State Farm Mutual Automobile Insurance Company, 479 S.W.2d 148 (Mo.App. 1972).

Insurance companies have, on numerous occasions attempted to restrict the mandated uninsured motorist protection by anti-stacking provisions contained within their policies. The Missouri Court of Appeals have uniformally held that so long as an individual is a named insured, anti-stacking provisions are unenforceable as against public policy, *Famuline v. Farmers Insurance Co. Inc.*, 619 S.W.2d 894 (Mo.App. 1981); *Galloway v. Farmers Insurance Co. Inc.*, 523 S.W.2d 339 (Mo.App. 1975).

As demonstrated in this Petition for Writ of Certiorari, the holdings of the United States District Court and United States Court of Appeals for the Eighth Circuit (enforcing this policy provision): 1) violated and defeated the specific stated purpose of the Missouri uninsured motorist statute and 2) conflict with the Eighth Circuit Court of Appeals' Opinion of *Bernardo v. Northland Insurance Company*, violating firmly entrenched Missouri Public Policy. The result of enforcing this policy provision will be adoption of this policy provision industry wide by insurance companies. This policy provision will result in the elimination of uninsured motorist protection in cases involving joint tortfeasors. It is respectfully submitted that the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings (and sanctioned such a departure by the District Court) so as to call for an exercise of this Court's supervisory powers.

WHEREFORE, Petitioner requests this Court to grant his Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 96-1391

Tyson E. Tatum, Appellant, v. Van Liner Insurance Company of Fenton, Missouri, Appellee.	*	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: September 13, 1996

Filed: January 13, 1997

Before WOLLMAN, ROSS and HANSEN, Circuit Judges.

ROSS, Circuit Judge.

Appellant Tyson Tatum appeals from the district court's[1] judgment entered in favor of appellee Van Liner Insurance Company on his personal injuries claim based

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[1] The Honorable Charles A. Shaw, United States District Judge for the Eastern District of Missouri.

on Van Liner's uninsured motorist coverage provision. We affirm.

On October 31, 1990, appellant was a passenger in a tractor trailer driven by William Tribble and owned by Hogan Transport, Inc. Tribble was forced to stop suddenly when an unknown vehicle, identified only as a red Ford Escort, swerved in front of the truck. When Tribble applied his brakes, the truck he was driving was struck from the rear by a second tractor trailer, driven by Mark Taylor. Appellant sustained serious and permanent injuries as a result of the accident, and he subsequently filed suit against Taylor and Taylor's employer, National Carriers. Appellant eventually received $150,000 in settlement of this claim.

Appellant then brought the present action against Van Liner Insurance Company, seeking sums under the uninsured motorist (UM) provision of a policy of insurance issued by Van Liner to Hogan Transport. The policy provided UM coverage in the amount of $50,000. The UM provision stated:

> Any amount payable under this insurance shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's liability coverage.

In its answer, Van Liner asserted as an affirmative defense that appellant had received in settlement an amount exceeding Van Liner's UM coverage and, therefore, pursuant to the policy setoff language, appellant was not entitled to additional sums under the Van Liner policy. Tatum moved to strike the affirmative defense based on the collateral source rule. The district court

denied appellant's request to strike and granted Van Liner's motion to dismiss[2] based on its setoff claim.

On appeal, Tatum argues there is no authority to support a setoff to the uninsured motorist policy limits from a settlement with another joint tortfeasor. Although Missouri law generally holds that "[t]he statutory policy of Missouri forbids impairment of the prescribed minimum uninsured motorist coverage by another policy provision attempting to limit liability," *Webb v. State Farm Mut. Auto. Ins. Co.*, 479 S.W.2d 148, 154 (Mo. Ct. App. 1972), Missouri courts have never addressed the issue presently before this court, namely whether an injured motorist may recover under a UM provision when he has already recovered far in excess of the statutory minimum UM amount from an insured motorist.

In *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo. 1996) (en banc), the defendant/tortfeasor had liability insurance in the amount of $10,000, well below the $25,000 minimum liability coverage required by the Motor Vehicle Financial Responsibility Law. *See* Mo. Rev. Stat. § 303.030.5 (providing that any Missouri automobile liability insurance policy must provide minimum coverage of $25,000 per person/$50,000 per accident). In a plurality opinion, the Missouri Supreme Court held that because the tortfeasor's liability policy did not meet the statutory minimum, the plaintiff qualified as an uninsured motorist and was allowed to recover under his two UM policies.

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[2] Because the district court considered evidence outside the pleadings in order to arrive at its decision, the court's ruling was, in effect, an order of summary judgment and we consider it such on appeal. Fed. R. Civ. P. 12(b).

Although the plaintiff's combined UM coverage under the two policies contractually provided $150,000 in coverage, the majority allowed the plaintiff to recover only up to the $25,000 statutory minimum provided under Missouri law, or a total UM coverage of $50,000 under the two policies. Moreover, from this $50,000 minimum coverage under the two UM policies, the court subtracted the $10,000 already recovered from the inadequately insured tortfeasor.

Viewing the *Ragsdale* opinion as a whole, it offers very little guidance by the Supreme Court of Missouri, other than the end result which was to allow the setoff of UM coverage by other insurance recoveries. Though it is somewhat enigmatic, we read *Ragsdale* as an indication that the Missouri Supreme Court will allow recovery under a UM policy, even when the plaintiff has received some recovery under a motor vehicle liability policy, but only up to the statutory minimum, reduced by the amount already recovered. The focus in *Ragsdale* and the UM provision of Mo. Rev. Stat. § 379.203 is to ensure that an injured motorist has available at least the statutory minimum amount of recovery required by the Motor Vehicle Financial Responsibility Law, Mo. Rev. Stat. § 303.030.5. Because appellant in the present case has already received far in excess of the statutory minimum, the public policy of Missouri's UM statute is satisfied. As the setoff policy provision at issue here will not serve to reduce the statutorily-required minimum insured motorist coverage, we conclude the provision as applied does not conflict with public policy or Missouri law, and thus is valid. *See Douthet v. State Farm Mut. Auto. Ins. Co.*, 546 S.W.2d 156, 159 (Mo. 1977) (en banc).

We also reject appellant's argument that Van Liner's setoff defense is barred by the collateral source rule. As an exception to the general rule that damages in tort should be compensatory only, the collateral source rule permits recovery against a wrongdoer for the full amount of damages even though the plaintiff is also compensated from a different source which is "wholly independent" of the wrongdoer and whose payment is therefore collateral to his. *Overton v. United States*, 619 F.2d 1299, 1306 (8th Cir. 1980). Under this rule, "a wrongdoer" is not entitled to have damages for which he is liable reduced by amounts received by the claimant from a collateral source. *Id.* However, the application of the collateral source rule depends on proof that the plaintiff has contributed to the fund he claims as a collateral source. *Id.* at 1305-06. "The policy behind the collateral source rule simply is not applicable if the plaintiff has incurred no expense, obligation, or liability in obtaining the services for which he seeks compensation." *Washington v. Barnes Hosp.*, 897 S.W.2d 611, 620-21 (Mo. 1995) (en banc) (citing with approval *Florida Physician's Ins. Reciprocal v. Stanley*, 452 So.2d 514, 515-16 (Fla. 1984)).

We conclude the district court did not err in denying appellant's motion to strike and in granting judgment in favor of Van Liner. The judgment of the district court is affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 96-1391EMSL

Tyson B. Tatum, Appellant, vs. Van Liner Insurance Company of Fenton, Missouri, Appellee.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 26, 1997

Order Entered at the Direction of the Court:

/s/ Michael E. Gans
Clerk, U.S. Court Appeals, Eighth Circuit

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI EASTERN DIVISION

TYSON E. TATUM, Plaintiff, vs. VANLINER INSURANCE COMPANY OF FENTON, MISSOURI, Defendant.	)	Granted CAS Cause No: 4:94CV1695CAS 1/5/96

MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW defendant, Vanliner Insurance Company of Fenton, Missouri, and moves this Court for an order dismissing Plaintiff's complaint for failure to state a claim upon which relief can be granted and for grounds of said motion states:

1. On October 31, 1990, plaintiff was a passenger in a tractor trailer operated by Hogan Transport and driven by a co-employee on a delivery to Massachusetts when an unidentified motor vehicle described as a Ford Escort merged into plaintiff's lane of travel in front of plaintiff's vehicle, and a tractor trailer operated by Mark Taylor collided with the rear end of the motor vehicle in which plaintiff was a passenger causing plaintiff to sustain injury.

2. At the time of the collision, plaintiff was covered by a policy of liability insurance issued by Vanliner Insurance Company to Hogan Transport, policy number

BA00254200 which provided uninsured motorists benefits to Mr. Tatum in the amount of Fifty Thousand Dollars ($50,000.00).

3. After this accident plaintiff filed with the United States District Court for the District of Kansas a civil action for personal injuries against Mark Taylor and his employer, National Carriers, bearing cause number 92-4244. This lawsuit was settled by plaintiff against both defendants for the amount of $150,000.00.

4. Vanliner Insurance Company's policy provides:

> Any amount payable *under this insurance* shall be reduced by all sums paid by or for anyone who is legally responsible, including all sums paid under the policy's liability coverage.

(emphasis added). A copy of this provision is attached hereto and incorporated herein as Exhibit A.

5. Missouri courts have construed policy terms such as the above-referenced set-off provision to be unambiguous, valid and enforceable. *American Economy Insurance Co. v. Cornejo,* 866 S.W.2d 174, 178 (Mo.App. 1993), *Keating v. Gavrilovici,* 861 S.W.2d 205 (Mo.App. 1993). Under this term, defendant is entitled to set-off the $50,000.00 payable under the policy by the $150,000.00 already received by plaintiff.

6. Said set-off reduces the amount payable to plaintiff to zero. Plaintiff cannot recover any amount under defendant's uninsured motorist coverage.

WHEREFORE, Defendant Vanliner Insurance Company respectfully request [sic] that this court enter its

order dismissing Plaintiff's Complaint and for such other and further relief as this court deems just and proper.

A copy of the foregoing was faxed this 4th day of January, to: James F. Koester, Attorney for Plaintiff, 8000 Clayton Road, St. Louis, Missouri 63117.

Respectfully Submitted,

/s/ B R Plegge
Brian R. Plegge, No. 32500
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EXHIBIT A

ENDORSEMENT NO. CA 21 04 – MO UNINSURED MOTORISTS COVERAGE

MISSOURI UNINSURED MOTORISTS COVERAGE

STRUCK BY ANY VEHICLE OWNED BY YOU OR ANY "FAMILY MEMBER" THAT IS NOT A COVERED "AUTO." HOWEVER, THIS EXCLUSION DOES NOT APPLY TO YOU.

4. ANYONE USING A VEHICLE WITHOUT A REASONALBE [sic] BELIEF THAT THE PERSON IS ENTITLED TO DO SO.

5. PUNITIVE OR EXEMPLAARY [sic] DAMAGES.

D. LIMIT OF INSURANCE

1. REGARDLESS OF THE NUMBER OF "INSUREDS," PREMIUMS PAID, CLAIMS MADE OR VEHICLES INVOLVED IN THE "ACCIDENT," THE MOST WE WILL PAY FOR ALL DAMAGES RESULTING FROM ANY ONE "ACCIDENT" IS THE LIMIT OF UNINSURED MOTORISTS COVERAGE SHOWN IN THE DECLARATIONS.

   HOWEVER, IF "BODILY INJURY" TO WHICH THIS COVERAGE APPLIES IS SUSTAINED BY ANY PERSON OTHER THAN YOU OR ANY "FAMILY MEMBER," THE LIMIT OF INSURANCE SHOWN IN THE DECLARATIONS FOR THIS COVERAGE IS ALSO THE MOST WE WILL PAY REGARDLESS OF THE NUMBER OF COVERED "AUTOS."

2. ANY AMOUNT PAYABLE UNDER THIS INSURANCE SHALL BE REDUCED BY ALL SUMS PAID BY OR FOR ANYONE WHO IS LEGALLY RESPONSIBLE. INCLUDING ALL SUMS PAID UNDER THE POLICY'S LIABILITY COVERAGE.

3. ANY AMOUNT PAID UNDER THIS INSURANCE WILL REDUCE ANY AMOUNT AN "INSURED" MAY BE PAID UNDER THE POLICY'S LIABILITY COVERAGE.

E. CHANGES IN CONDITIONS

THE CONDITIONS ARE CHANGED FOR MISSOURI UNINSURED MOTORISTS COVERAGE AS FOLLOWS:

1. THE REFERENCE IN OTHER INSURANCE TO "OTHER COLLECTIBLE INSURANCE" APPLIES ONLY TO OTHER COLLECTIBLE UNINSURED MOTORISTS INSURNACE. [sic]

2. DUTIES IN THE EVENT OF ACCIDENT. CLAIN, [sic] SUIT OR LOSS IS CHANGED BY ADDING THE FOLLOWING:

   A. PROMPTLY NOTIFY THE POLICE IF A HIT-AND-RUN DRIVER IS INVOLVED AND

   B. PROMPTLY SEND US COPIES OF THE LEGAL PAPERS IF A "SUIT" IS BROUGHT.

3. TRANSFER OF RIGHTS OF RECOVERY AGAINST OTHERS TO US IN CHANGED BY ADDING THE FOLLOWING:

STATUTE INVOLVED

R.S.Mo. §379.203(1) – No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registerd [sic] or principally garaged in this state unless coverage is provided therein or supplemental therto [sic], or in the case of any commercial motor vehicle, as defined in section 301.010, RSMo, any employer having a fleet of five or more passenger vehicles, such coverage is offered therein or supplemental thereto, in not less than the limits for bodily injury or death set forth in section 303.030, RSMo, for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom. Such legal entitlement exists although the identity of the owner or operator of the motor vehicle cannot be established because such owner or operator and the motor vehicle departed the scene of the occurrence occasioning such bodily injury, sickness or disease, including death, before identification. It also exists whether or not physical contact was made between the uninsured motor vehicle and the insured or the insured's motor vehicle. Provisions affording such insurance protection against uninsured motorists issued in this state prior to October 13, 1967, shall, when afforded by any authorized insurer, be deemed subject to the limits prescribed in this section, to satisfy the requirements of this section.

(2)

Supreme Court, U.S.
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No. 96-1888

In The

Supreme Court of the United States

October Term, 1996

TYSON E. TATUM,

Petitioner,

v.

VANLINER INSURANCE COMPANY
OF FENTON, MISSOURI,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE LISTING

Pursuant to Supreme Court Rule 29, Respondent Vanliner Insurance Company of Fenton, Missouri, states that United Van Lines, Inc., and UniGroup are parent companies/nonwholly-owned subsidiaries of Vanliner Insurance Company of Fenton, Missouri.

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STATEMENT OF THE CASE

Respondent generally adopts Petitioner's Statement of the Case, with the following exceptions. The evidence developed in the case shows that Petitioner was not employed by Hogan Transports (a company that does not employ drivers), but SDI Services. (Appellee's Appendix, pp. 17-19.) In addition, the District Court granted Respondent's Motion to Dismiss Plaintiff's Complaint in writing. (Appellee's Appendix, pp. 4, 11.)

ARGUMENT

I. THIS COURT SHOULD NOT GRANT PETITIONER'S PETITION FOR WRIT OF CERTIORARI, BECAUSE THE ASSERTED ERROR CONSISTS OF AN ALLEGED MISAPPLICATION OF A PROPERLY STATED RULE OF [MISSOURI] LAW, WHICH IS NOT A SOUND REASON FOR GRANTING CERTIORARI.

Petitioner has requested that this Court exercise its judicial discretion in granting his Petition for Writ of Certiorari on the ground that "the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings or has sanctioned such a departure by the District Court, as to call for an exercise of this Court's supervisory powers." However, the sole issue in this case involves the court's interpretation of an insurance policy and the application of § 379.203 R.S.Mo., the Missouri uninsured motorist statute. This issue is simply not one for which this Court should exercise its discretion in granting the Petition for Writ of Certiorari.

United States Supreme Court Rule 10 states that "[a] petition for a writ of certiorari will be granted only for compelling reasons." One of such reasons, although not controlling, is that "a United States court of appeals . . . has so far departed from the usual and accepted course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power. . . . " S. Ct. R. 10(a). However, Rule 10 also states that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Thus, this Court has stated that it will not generally grant a petition for certiorari solely to review applications of state law. *See, e.g., Leavitt v. Jane L.*, 116 S. Ct. 2068, 2072 (1996). Although *Leavitt* involved the review of the application of state law, the dissent contended that the court should not have exercised its discretion in granting review of such an issue. The dissent, consisting of Justice Stevens, who was joined by Justices Souter, Ginsburg, and Breyer, addressed this situation, as follows:

> It is contrary to our settled practice to grant a petition for certiorari for the sole purpose of deciding a state-law question ruled upon by a federal court of appeals. The justifications for that practice are well established: *the courts of appeals are more familiar with and thus better qualified than we to interpret the laws of the States within their Circuits; the decision of a federal court (even this Court) on a question of state law is not binding on state tribunals; and a decision of a state-law issue by a court of appeals, whether right or wrong, does not have the kind of national significance that is the*

> *typical predicate for the exercise of our certiorari jurisdiction.*
>
> * * *
>
> *Even if the court of appeals has rendered an incorrect decision, that is no reason for us to jettison the traditional guides to our practice of certiorari review. The doctrine of judicial restraint counsels the opposite course.*

[Emphasis added.] *Id.* at 2073.

The dissenting justices then went on to discuss the cases cited by the majority, which the latter used as precedent to grant review of a state-law issue. They stated that *Wichita Royalty Co. v. City National Bank of Wichita Falls*, 306 U.S. 103 (1939), was in fact "plainly motivated by a concern to give effect to Erie's [*Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)] new mandate [that federal courts follow state decisions on matters of general law]." *Id.* at 2073. In *Steele v. General Mills*, 329 U.S. 433 (1947), the Court granted certiorari because the lower court's judgment "undermined the transportation policy of Texas." *Id.* The dissent then acknowledged that *Steele* was in fact a review of state-law application, but argued that it was the single case in which such a review was granted. The dissent argued that *Steele* should not serve as precedent in granting the petition for certiorari, as follows:

> Decided nearly 50 years ago and without successor, Steele is the exception that proves the rule.
>
> However irregular such grants were in the past, *they are now virtually unheard of. Indeed, in 1980 we codified our already longstanding practice*

> *by eliminating as a consideration whether to review a case the fact that "a court of appeals has . . . decided an important state or territorial question in a way in conflict with applicable state or territorial law. Compare this Court's Rule 19(1)(b) (1970) with this Court's Rule 17.1 (1980). That deletion – the only deletion of an entire category of cases – was intended to communicate our view that errors in the application of state law are not sound reason for granting certiorari, except in the most extraordinary cases. Tellingly, the majority does not cite a single example during the past 16 years in which we have departed from this reemphasized practice. This case should not be the first.*

[Emphasis added.] *Leavitt*, 116 S. Ct. at 2073-74. Following this reasoning then, the case at bar, which involves the sole issue of the interpretation and construction of a single insurance policy under Missouri law, should not be the next case in which the Court departs from the well-established practice of not reviewing such matters. This Court should deny Petitioner's Petition for Writ of Certiorari in this case on this basis.

II. IN ANY EVENT, THIS COURT SHOULD NOT GRANT PETITIONER'S PETITION FOR WRIT OF CERTIORARI, BECAUSE THE DISTRICT COURT'S RULING AND THE APPELLATE COURT'S AFFIRMATION ARE IN ACCORDANCE WITH MISSOURI LAW AND HAVE NOT VIOLATED A MISSOURI STATUTE OR THE PUBLIC POLICY OF MISSOURI.

Petitioner premises his argument on the theory that "[t]he rulings of the United States District Court and the United States Court of Appeals have, for the first time in

Missouri law, permitted an uninsured motorist carrier to obtain a set-off from its statutorily mandated uninsured motorist protection from a settlement with a different insured joint tortfeasor." While Missouri courts have not had occasion to address an identical factual scenario as that presented by this case, they have consistently allowed uninsured motorist carriers to set-off amounts received in settlement from other liable parties. *See, e.g., Moreland v. Columbia Mutual Ins. Co.*, 842 S.W.2d 215, 226 (Mo. App. S.D. 1992). In *Moreland*, an uninsured motorist carrier was permitted to offset amounts payable under its coverage to plaintiff by amounts plaintiff received in settlement from other liable parties. *Moreland* further held that the uninsured motorist carrier was entitled to this credit, even though such credit would result in the carrier's paying less than its full pro rata share. The court reasoned that set-off was appropriate, as follows:

> Here, the plaintiffs, as victims of an uninsured motorist, would have us expand a public policy designed to protect them so as to enhance their claims and permit them to recover more than the amount of their loss. This we decline to do. It is well settled in Missouri that a party cannot be compensated for the same injury twice. [Citation omitted.] The remedy provided in a given case shall afford compensation only for whatever injury is actually sustained. [Citation omitted.]

Id. at 226. The court then cited with approval *Weeks-Maxwell Const. Co. v. Belger Cartage Serv.*, 409 S.W.2d 792 (Mo. App. 1966), in which the court stated:

> As a general rule, a person who has sustained loss or injury may receive no more than

> just compensation for the loss or injury sustained. *He is not entitled to be made more than whole, and he may not recover from all sources an amount in excess of the damages sustained, or be put in a better condition than he would have been had the wrong not been committed.*

[Emphasis added.] *Moreland*, 842 S.W.2d at 227.

The most recent Missouri case evidencing an uninsured motorist insurer's right to set off amounts received from a tortfeasor is *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo. banc 1996). In *Ragsdale*, the plaintiffs, John and Donna Ragsdale, were involved in an auto accident with defendant Shelley Armstrong, a Louisiana resident. Ms. Armstrong carried liability insurance with limits of $10,000 per person and $20,000 per accident, less than the $25,000/$50,000 amounts required by Missouri law. Therefore, Armstrong qualified as an uninsured motorist under Missouri law. *Cook v. Pedigo*, 714 S.W.2d 949, 952 (Mo. App. 1986).

The Ragsdales had two automobile policies issued through Shelter Insurance, with uninsured motorist coverages of $50,000 and $100,000 per person respectively. John Ragsdale settled with Armstrong for the policy limits of $10,000, then sued Shelter for benefits under his uninsured motorist coverage. The trial court awarded Mr. Ragsdale $140,000 – the $150,000 total amount payable under the policies, *less the $10,000 already received in settlement*. The Missouri Court of Appeals affirmed the judgment. On appeal to the Missouri Supreme Court, Judges Benton, Holstein, and White voted to affirm the trial court and allow the plaintiffs to collect $140,000. Judge Price voted to allow the plaintiffs to recover $25,000

under each policy, the level of insurance mandated by Missouri law, *"offset by the $10,000 already received, for a total of $40,000."* *Ragsdale*, 916 S.W.2d at 784 [emphasis added]. Judge Robertson wrote that the recovery should be limited to $15,000 ($25,000, the amount of mandatory coverage, *less the $10,000 received from the tortfeasor*). Finally, Judges Limbaugh and Covington would not have permitted the plaintiffs to collect their uninsured motorist coverages under the Shelter policies, because the defendant did, in fact, carry a minimal amount of insurance. Because four of the judges voted to award the Ragsdales at least $40,000, the case was remanded to the trial court for entry of judgment in that amount. *Id.* at 783-84.

Both *Moreland, supra,* and *Ragsdale, supra,* involve factual scenarios similar to the case at bar: plaintiffs recovered from other liable parties, then sought uninsured motorist coverage. In both cases, the uninsured motorist carrier was allowed to set off the amounts paid by others in settlement to the plaintiff.

The cases cited by plaintiff, *Cano v. Travelers Ins. Co.*, 656 S.W.2d 266 (Mo. banc 1983), and *Douthet v. State Farm Mut. Ins. Co.*, 546 S.W.2d 156 (Mo. banc 1977), are factually distinguishable. In those cases, the plaintiffs collected medical benefits and/or workers' compensation coverage, then sought uninsured motorist benefits. The uninsured motorist carrier was not permitted the offset under those circumstances. The case at bar does not involve an offset of workers' compensation or medical pay benefits.

The purpose of uninsured motorist coverage is to put the claimant in as good a position as he would have been

had he been involved in an accident with an insured driver. *Weinberg v. State Farm Mutual Auto Ins.*, 659 S.W.2d 236, 238 (Mo. App. 1983). In this case, Tatum was, in fact, injured by a fully insured driver, and received a substantial recovery for his injuries – plaintiff's recovery exceeded his medical expenses by approximately 800%. Nevertheless, plaintiff in effect argues that defendant is liable for the limits of uninsured motorist coverage under the policy, because an uninsured motorist carrier can *never* reduce the amounts payable under its policy. Tatum's argument is not only contrary to Missouri law as expressed in *Moreland* and *Ragsdale*, but contrary to logic as well. If Tatum's arguments were accepted, uninsured motorist policy limits would always be recoverable to persons injured in accidents involving uninsured drivers, regardless of the damages and regardless of the extent to which those damages have been compensated by the negligent parties. Under Tatum's reasoning, in accidents involving both insured and uninsured driver, a plaintiff who is fully compensated for his injuries by the insured driver is still entitled to "windfall" benefits from his uninsured motorist carrier. Missouri courts have never expressed an intent to permit plaintiffs excessive recovery due to the fortuitous existence of multiple insurance policies. Although Missouri public policy favors compensating victims of torts, this policy cannot be expanded to permit a claimant to recover twice for the same injury. *Moreland*, 842 S.W.2d at 226. Allowing a set-off for amounts received in a common law tort judgment or settlement promotes the policy against double recovery.

Petitioner's contention that he is "entitled to a recovery from both joint tortfeasors" is a misstatement of Missouri law on joint and several liability. A Missouri statute, § 537.060 R.S.Mo., which mandates the reduction of a claim against remaining joint tortfeasors in the amount; received in settlement from a settling tortfeasor, states in pertinent part as follows:

> When an agreement by release, covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or wrongful death, such agreement shall not discharge any of the other tortfeasors for the damage unless the terms of the agreement so provide; *however such agreement shall reduce the claim by the stipulated amount of the agreement or in the amount of consideration paid, whichever is greater.*

[Emphasis added.]

Thus the interpretation and construction of the policy of insurance by the District Court and the Court of Appeals, given the particular facts of this case, is consistent with both § 379.203(1) and § 537.060 R.S.Mo. The fact that Respondent is an uninsured motorist carrier, as opposed to a "tortfeasor," should not prevent Respondent from the benefit of setting off from Petitioner's claim the amount received by Petitioner in settlement from the National Carrier tractor trailer. In ruling otherwise, the District Court and the Court of Appeals would have permitted Petitioner to receive a "windfall." This is against the public policy of Missouri and is not the intent of the statutorily mandated uninsured motorist protection. The ruling of the District Court and affirmation by

the Appellate Court placed the Petitioner in the same position as he would have been had he been involved in an accident with insured drivers. Thus the ruling fully satisfied the public policy of the State of Missouri with regard to uninsured motorist coverage.

CONCLUSION

The writ of certiorari should be denied.

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ARGUMENT

The Respondent suggests to this Court that the issue in this underlying cause of action is insufficient to warrant the granting of a Writ of Certiorari. However, the ruling of the District Court and affirmation by the Court of Appeals undermines the uninsured motorist public policy of the State of Missouri. As such, the ruling has so far departed from the usual and accepted course of judicial proceedings so as to call for an exercise of this Court's supervisory power. Respondent's Brief cites the case of *Steele v. General Mills*, 329 U.S. 433 (1947), wherein this Court granted a Writ of Certiorari. "Whether the Circuit Court of Appeals' judgment does undermine the transportation policy of Texas is a question of such importance that we granted certiorari to review the case", *Steele* at page 438. Likewise, whether the District Court's judgment undermines the uninsured motorist policy of the State of Missouri is a question of such importance that this Court should grant certiorari to review the case.

The Respondent has consistently cited cases that deal with a single tortfeasor rather than joint tortfeasors. The distinction is of importance because there is no case law in the history of Missouri which permits a settlement with one tortfeasor to reduce the policy limits of the different joint tortfeasor. The cases of *Moreland v. Columbia Mutual Insurance Company*, 842 S.W.2d 215 (Mo.App. 1992) and *Ragsdale v. Armstrong*, 916 S.W.2d 783 (Mo.Banc. 1996) are prime examples of cases involving single tortfeasors. They did not involve joint tortfeasors. The case at bar involves joint tortfeasors. This fact makes *Moreland* and *Ragsdale* distinguishable and clearly inapplicable to the case at bar.

Moreland merely involved a pro rata distribution of payments by differing uninsured motorist carriers based upon the negligence of a single tortfeasor. "Where there are several 'layers' or 'stacks' of automobile insurance coverage available to respond to the same injury or death, Missouri Courts have held that the insurers involved are obliged to contribute pro rata to the loss to the extent of their combined coverage, *Moreland* page 225. *Moreland* dealt with pro rata contribution of differing uninsured motorist carriers for the same negligent act by the same tortfeasor. *Moreland* provides no authority for the proposition that a settlement with one tortfeasor causes a reduction in the policy limits based upon the negligence of a different joint tortfeasor.

As demonstrated in the Petition for Writ of Certiorari, *Ragsdale* is clearly inapplicable to the case at bar. There was but one tortfeasor in *Ragsdale*. The real issue was whether the tortfeasor was, in fact, an uninsured motorist. There is no authority for taking a settlement with one tortfeasor and reducing the policy limits for a second tortfeasor.

On page 8 of the Respondent's Brief, they allege that it is the Petitioner's position that the uninsured motorist policy limits would always be recoverable regardless of damages. This is not the Petitioner's position. The Petitioner would be entitled to uninsured motorist compensation only if the damages would support such a verdict. However, the damages sustained by the plaintiff have never been set by Judge nor jury. The prior claim against National Carriers was settled.

Total damages have never been assessed in the case at bar. This fact makes *Moreland* and *Ragsdale* inapplicable. In *Moreland* the jury assessed the damages and then the Court determined the pro rata contribution amongst differing uninsured motorist carriers. In *Ragsdale* the Court assessed the damages and then entered a verdict based upon the uninsured motorist coverages. Since total damages have never been assessed, we do not know whether Mr. Tatum has received full compensation.

The Respondent has inferred that the Plaintiff has received total compensation because the Plaintiff's recovery exceeded his medical expenses by approximately 800 percent. This misleading statement ignores Mr. Tatum's surgery; his period of rehabilitation; the fact that Mr. Tatum had to retire as a truck driver years earlier than he had anticipated and his other elements of damage. Although the Appellant has not received full compensation, it is not the Petitioner's nor Respondent's function to determine whether Mr. Tatum has been fully compensated. That should be determined by a Judge or jury. Once a Judge or jury has made a determination as to total damages, we will then know if Mr. Tatum has been fully compensated.

The Petitioner has cited the Missouri Statute on joint and several liability R.S.MO. §537.060. The Respondent somehow feels this statute bolsters their position. However, this statute provides that "when an agreement by release . . . is given in good faith to one of two or more persons liable in tort . . . such agreement shall reduce the *claim* by the stipulated amount . . . " (emphasis added)

As can be seen, this statute does not reduce one of the tortfeasors' policy limits, it only reduces the amount of the claim. Once again, the amount of the claim or the damages has not been assessed by Judge or jury. This statute provides no support for the position of reducing one tortfeasor's policy limits based upon the settlement with a different joint tortfeasor.

Additionally, this statute has no application to the case at bar. "The right of the injured party to recover from an uninsured motorist carrier arises from the insurance contract rather than in tort," *Automobile Club Insurance Exchange v. Farmers Insurance Company,* 646 S.W.2d 838 (Mo.App. 1982); *Elfrink v. Burlington Northern Railroad Company,* 945 S.W.2d 607 (Mo.App. 1992). "The statute is only applicable as between tortfeasors and does not address the liability under contract only," *Hagedorn v. Adams,* 854 S.W.2d 470 (Mo.App. 1993).

Petitioner requests this Court to grant his Petition for Writ of Certiorari. The decision of the District Court and the affirmation of the Federal Court of Appeals will undermine the uninsured motorist public policy of Missouri.

> . . . the Public Policy of Missouri now declares that the minimum benefits . . . without diminishment, be available to an insured injured by an uninsured motorist. It also means that the insurance policy provision which designs to restrict the insured from these benefits evades the purpose of the statute and is void against public policy, *Craig v. Iowa Kemper Mutual Insurance Company,* 565 S.W.2d 716 (Mo.App. 1978).

There is a " . . . strong public policy underlying the uninsured motorist coverage statute, *Moreland* page 225. To permit the District Court decision to stand will defeat this strong public policy and undermine the uninsured motorist policy of the State of Missouri. The decision of the District Court prevents an individual from being in the same position as he would have been had he been injured by an insured motorist.

CONCLUSION

Petitioner requests this Court to enter an Order granting his Writ of Certiorari.

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